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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 436.

IN THE MATTER

of

UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR.

ABE SCHWARTZ, *et al.*,

Petitioners,

v.

IRVING TRUST COMPANY, as Trustee of UNITED CIGAR STORES COMPANY OF AMERICA, *et al.*

SUGGESTION FOR AMENDMENT OF THE COURT'S OPINION, AND PETITION FOR REHEARING

WM. D. WHITNEY,
Counsel for Irving Trust Company, as Trustee of the Estate of United Cigar Stores Company of America, Debtor,
15 Broad Street,
New York, N. Y.

DONALD C. SWATLAND,
R. L. GILPATRIC,
Of Counsel.

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IN THE MATTER *of* UNITED CIGAR STORES COMPANY OF AMERICA, DEBTOR, ABE SCHWARTZ, *et al.*, *Petitioners*, v. IRVING TRUST COMPANY, as Trustee OF UNITED CIGAR STORES COMPANY OF AMERICA, *et al.*	No. 436.

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SUMMARY STATEMENT

To prevail in this case, the petitioners had to sustain two positions, (1) that surrender of their leases, as accomplished by the assignment agreements, did not terminate their rights to prove under a *subsequently enacted* statute, and (2) that such rights were preserved by the qualifications to the general releases which otherwise would have barred the claims regardless of such statute. The decision in favor of the petitioners on the first point followed necessarily from the decision in the *City Bank Farmers Trust Company* case (No. 260), which we accept as final. The only considera-

tions herein presented relate to the second point. C that, the decision involved a single isolated clause (the so-called "qualified release clause") in a contract or group of contracts, and did not involve any fundamental question of Federal or other law.

The Court evidently considered that the claims *sub judice* were the only ones involving this clause that were presented in this estate;[1] whereas, in fact the clause appears in contracts affecting 118 leases of the Debtor, of which 44 (including the 9 present cases) are the basis of claims pending in this proceeding.[2] The aggregate of these 44 claims (on the three years' rental basis) is upwards of $3,500,000, and it may well be that the full three years' rental will be recoverable in most of the cases, as they involve long term leases.

Your petitioner, although well aware that considerations of great weight in the orderly administration of judi-

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[1]The relevant language of the Court's opinion is:

> "Ninety-four landlords who had re-entered the demised premises, pursuant to such agreements, during the pendency of the original bankruptcy, filed claims in the reorganization proceeding. From the District Court's disallowance of the claims all the claimants joined in a single appeal to the Circuit Court of Appeals.".

This was not in substance a case of 94 single claimants joining in a single appeal, as all the 94 claimants were, from the beginning, represented by a single set of attorneys who were presenting all of these claims from the beginning as a unit. But there were altogether upwards of 600 landlords who had executed releases, and upwards of 100 landlords whose releases were qualified by riders of the type concerned in the present case.

[2]In addition there is the possibility that some or all of the other landlords (whose claims, if allowed, might aggregate over $2,500,000) may seek to file claims after the bar date. One such landlord has already petitioned for leave to file a late claim, basing his petition upon the decision of this Court in this case.

cial procedure dictate that ordinarily petitions for rehearing to this Court should not be granted, and therefore accepting as final and irrevocable the adverse decision of this Court on the important legal questions determined in the case of *City Bank Farmers Trust Company* v. *Irving Trust Company* (No. 260), yet respectfully submits that the above-entitled case (*Schwartz* v. *Irving Trust Company,* No. 436) is so unusual as to call for further consideration.

It is submitted, firstly, that in any event (*i.e.* accepting the decision as right) there should be modifications in the statement of facts in the opinion, and secondly, that there should be a rehearing as to the decision itself.

SUGGESTED REVISIONS IN THE STATEMENTS OF FACT IN THE COURT'S OPINION

I.

The following sentence in the first paragraph of the Court's opinion appears to call for modification:

> "Some of the leases contained indemnity covenants similar to that considered in No. 354; one lacked any stipulation for damages or indemnity, as did the lease which gave rise to the claim in No. 260."

In point of fact, *each* of the leases contained a stipulation for indemnity.[3] It is respectfully submitted that this sentence should, therefore, be amended to read:

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[3]Schwartz—R. 67e, fol. 201e; Munk—R. 82, fol. 245; Lorch—R. 132, fol. 395; Nunn—R. 174, fol. 520; Livingston—R. 184, fol. 552; Brown—R. 206, fol. 618; Rubel—R. 224, fol. 671; Whitcomb—R. 233, fol. 699; and Excell—R. 246, fol. 737.

"Each of the leases contained an indemnity covenant similar to that considered in No. 354."

The point is of substantive importance, as the Court's decision may then properly be based upon the grounds,

(1) that, regardless of whether these leases were rejected, as each contained an express covenant of indemnity, they are all entitled to the benefit of the statute when construed to apply retroactively (as it was construed in the *City Bank Farmers* case, No. 260, the decision in which we are not asking the Court to reconsider), and

(2) that in each of the contracts affecting these leases the rider qualifying the general release was sufficient to reserve the right to prove such claim on the indemnity covenant.[4]

II.

If so corrected, the Court's opinion would not support the hypothesis that the Court's *decision* was based upon a determination that each of the landlords had a claim for injury arising from the *rejection* of his lease by the Trustee in the prior bankruptcy proceeding (in addition to, and exclusive of, such claim on the indemnity covenant). We do not dispute (in view of the decision in the *City Bank Farmers Trust Company* case, No. 260) that the law is that any landlord who has been injured by *rejection* by the Trustee in a prior bankruptcy proceeding *may* have

[4]Our petition for rehearing asks for a review on this latter point, but for the purpose of suggesting this particular correction in the Court's opinion we accept it.

a claim on that ground alone, whether or not his lease contains a covenant for damages or indemnity. But there is no ground for the assumption in this case that *each of these nine claimants* had had his lease *rejected.* On the contrary, *it is expressly stipulated* that in four of the cases the lease had *not been rejected* by the Trustee. See Schedule A to the Stipulation, R. 321.

Therefore, it is respectfully submitted that the third sentence of the opinion should be stricken, to-wit, the following sentence:

> "As in Nos. 260 and 354, *ante,* their leases were rejected in a bankruptcy proceeding pending when the reorganization section was adopted."

It may, of course, be argued that, although there was no rejection in fact, a rejection within the meaning of the statute may be implied in law from the fact that the Trustee had not expressly elected to affirm. In fact, just such a contention is now being urged on behalf of certain landlords before the court below in cases which require a determination of the question. However, we cannot believe that this Court intended to pass on that question in this case, for the following reasons:

(1) The question is an important question of Federal law, particularly as the word "rejection" in Section 77B had not received any prior judicial definition.

(2) Determination of the question was not necessary to a decision.

(3) There is no discussion of the question in the opinion of the Court in this case or in any one of the three companion cases decided together with this No. 436.

(4) The question was not argued at all at the bar.

(5) The question was not argued in any brief, except a reply brief filed after the argument, and to which we had no opportunity to respond.[5]

(6) The argument that four leases were rejected was made in the teeth of a stipulation that they were not rejected.

As already pointed out, the deletion or correction of the above-mentioned two sentences in this Court's opinion would not affect the result of this Court's decision.

However, the Trustee most respectfully submits that the decision in this particular case was wrong, and, therefore, further petitions for a rehearing.

GROUNDS FOR PETITION FOR REHEARING

The Trustee accepts the decision in the *City Bank Farmers Trust Company* case, No. 260. That case involved an important and fundamental *question of law*, which was peculiarly appropriate for determination by this Court. We bow to the result.

The present case (No. 436), on the other hand, is, so far as principles of law are concerned (as distinct from the importance of the case in its application to this particular estate), of much less importance. This is recognized in the first paragraph of the opinion of the Court, in which the present case is referred to as merely a "variant" of the *City Bank Farmers Trust Company* case. The question in

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[5]It is said in that brief, in extenuation of its late filing, that our answering brief was not served until the day the landlords' counsel left for Washington. It was served in final form on Saturday, December 12, and the case was not argued until Wednesday, December 16. Proofs of our brief, substantially in final form (except as to the argument on the two-court rule), had previously been served on the landlords' counsel.

No. 436 is a question involving only the construction of a particular clause in a particular contract or group of contracts.

The effect of the Court's decision in respect of this single contract clause has been to alter completely the complexion and extent of the claims provable in this estate. When it is realized that this result has been reached by this Court on what is peculiarly a question of fact (the intent of the parties in executing the clause in question), and that that question of fact has been determined adversely to the concurrent findings of the Special Master, the District Court and a majority of the Circuit Court of Appeals, the result appears to be of a character so unusual and far-reaching as to justify a review on rehearing.

On rehearing, an opportunity would be given to the Trustee to press upon this Court considerations which are not mentioned in the opinion, to-wit, the volume of evidence in the record showing the intent of the parties at the time of the drafting and adoption of this qualifying rider.

The record shows concretely that the qualifying rider in question was adopted so that there might be preserved to the landlord the right to assert claims for back rent and/or taxes which were provable under Section 63a of the Bankruptcy Act as it then (in 1932) stood and which otherwise would have been lost through the effect of the general release. As an example, take the testimony of the Trustee's representative in charge of this estate (R. 271):

> "Q. What happened in the case of a landlord who had a claim for back rent or taxes which had not been paid? A. Well, in that event we instructed our representatives that they could insert a rider which modified this release and gave the landlord the right to prove any claim that he had which was a provable claim in bankruptcy * * * ".

Again, the documentary "Instructions" to the Trustee's representatives engaged in the negotiation of the releases, contained the following explicit statement of the purpose of the paragraph in question (R. 19):

> "Although it is understood that the Bankrupt Company paid rent falling due on the 1st of August or during the month of August prior to the bankruptcy, there may be cases in which there were amounts owing under the lease at the time of the bankruptcy in respect of back taxes and similar items. In such cases you should insert in the agreement the additional paragraph to the effect that the releases contained in the agreement do not constitute a waiver of the landlord's right to prove any provable claims which he may have. The purpose of this additional paragraph is to give the landlord a right to prove against the bankrupt estate any provable claims, if he has any, but it does not, of course, relieve the landlord from the necessity of proving and obtaining the allowance of such claims or preclude the Trustee from contesting such proof and allowance."

Other evidence of a similar character appears in the record, and it is respectfully submitted that none will be found to the contrary.[6]

The opinion of the Court states that:

> "The special master found, and it seems to be conceded, that the reservations were intended to preserve claims for future rent or for indemnity for loss of future rent."

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[6]Except perhaps the testimony of an attorney (Petacque) for one of the petitioners which, on analysis, appears to be clearly discredited. (Compare R. 307, fol. 921 with R. 281, fol. 841 and R. 288, fol. 864.)

Nothing is said in this sentence, or elsewhere, as to the claim for back rent or taxes which was the real cause for the adoption of the rider. Yet it is significant that the Special Master opened his consideration of these riders (R. 329, fol. 987) with the following paragraph:

> "In a limited number of cases it became necessary to add typewritten riders to the agreement which reserved the right 'to prove against the Bankrupt Estate any provable claim to which the Bankruptcy Court may adjudge the Landlords entitled to'. This was particularly true in the Chicago area in cases where the landlords had a net lease, namely, where the Bankrupt had agreed to pay the land taxes. The tax situation in Chicago at that time was in a snarl, the amount to be paid by the Bankrupt was uncertain, and naturally the general release was qualified as not to include these taxes or any provable claim which the Landlord then had against the Bankrupt Estate."

Taken together, the decisions in Nos. 354, 260 and 436 present this remarkable paradox. In the first two, this Court settled fundamental questions of law under which the provability of several million dollars of landlords' claims, which had previously been allowed by the lower courts, is authoritatively established. In the third—the instant case—the Court did not settle any important question of law (unless the one as to the meaning of "rejection" which, as already pointed out, was not argued), but merely reversed a concurrent finding by two Courts below as to the meaning and intent of a contract provision. The exercise by this Court of its power to reverse under such circumstances is so rare as to give rise to the assumption that impelling motives have compelled it. Yet here the exercise appears to have been in the teeth of the substantially un-

disputed evidence in the record. And the effect of the exercise has been seriously to dilute the claims of the very landlords the legitimacy of whose claims had just been settled by this Court in the exercise of its normal power of appellate review of important questions of law.

We respectfully submit that, before this result becomes final, this Court should afford an opportunity for thorough argument before it on the precise question which has thus become so vitally important to the whole estate and to those interested in it,—the meaning and intent of the contract in question. Our suggestion is that, before the reversal of the concurrent lower Courts on this precise question becomes final (with all its attendant and decisive effects in this estate), the Court give a further and final opportunity for an argument before it on the relevant facts in the record.

Respectfully submitted,

WM. D. WHITNEY,
Counsel for Irving Trust Company, as Trustee of the Estate of United Cigar Stores Company of America, Debtor,
15 Broad Street,
New York, N. Y.

DONALD C. SWATLAND,
R. L. GILPATRIC,
Of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, that it has merit in both law and fact, and that it is deserving of the consideration of the Court.

Dated, January 23, 1937.

WM. D. WHITNEY.